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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~H33~~ 233

PUTNAM TOOL COMPANY, a Michigan Corporation, in its own right and as successor in interest to E. C. Putnam and F. J. Nefske, d/b/a Putnam Tool Company, a co-partnership,

and

E. C. PUTNAM and F. J. NEFSKE, d/b/a Putnam Tool Company, a co-partnership, for the use and benefit of Putnam Tool Company, a Michigan Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CHARLES D. HAMEL
Attorney for Petitioner
1000 Shoreham Building
Washington 5, D. C.

Of Counsel:

LEE I. PARK
K. MARTIN WORTHY
FULLER HOLLOWAY

HAMEL, PARK & SAUNDERS
1000 Shoreham Building
Washington 5, D. C.

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner by its attorneys prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled cause on January 16, 1957.

OPINIONS BELOW

The opinion of the United States Court of Claims (R. 23) is reported at 147 F. Supp. 746.

JURISDICTION

The judgment of the United States Court of Claims was entered on January 16, 1957 (R. 23-27), and a copy thereof is appended to this petition in the Appendix at pp. 3a-7a. A petition for reconsideration was timely filed on February 15, 1957 (R. 28), and was denied on April 3, 1957 (R. 28). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255 (1).

QUESTIONS PRESENTED

I. Whether payment of a unilateral order of the War Contracts Price Adjustment Board demanding interest at the rate of six percentum per annum on the principal amount due under the Board's determination of excessive profits, which rate of interest was required by an executive regulation, issued without lawful authority, precludes a suit for recovery in the Court of Claims of the difference between the amount of interest paid at the rate required by the regulation and the amount due at a reasonable rate on the ground that the payment at the rate prescribed by the regulation and the order was voluntary.

II. Whether, as a condition to recovery of amounts paid as required by an invalid regulation and under a demand of the War Contracts Price Adjustment Board, the Government must agree that suit may be brought in the Court of Claims.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of Title 28 U.S.C., Sec. 1491; the Second Renegotiation Act (Title VII, Revenue Act of 1943, 58 Stat. 78, Act of February 25, 1944); Fed. Rules Civ. Proc., Rule 41; and Renegotiation

Regulation dated December 29, 1944, 10 Fed. Reg. 963, 1009 (January 26, 1945), 32 Code Fed. Regs. § 1606.626-(2)(c) (Cum. Supp. 1944), are set forth in the Appendix at pp. 1a-2a.

STATEMENT

In a suit under 28 U.S.C. 1491 (2)(3),[1] providing for jurisdiction in the Court of Claims to render judgment upon any claim against the United States "Founded upon any Act of Congress; or Founded upon any regulation of an executive department", petitioner sought recovery of a sum equivalent to the difference between (a) the amount paid by it in compliance with a demand of the War Contracts Price Adjustment Board issued pursuant to a regulation of that Board requiring that interest be paid at 6 percent on the principal amount determined by the Board as excessive profits, and (b) the amount which petitioner admits it owed as interest on such determination at a fair and equitable rate of interest.

The War Contracts Price Adjustment Board, on adoption of the unilateral determination of the War Department Price Adjustment Board determining excessive profits, demanded that the petitioner repay to the United States the sum of $468,175 (after adjustment for tax credit) together with interest thereon at the rate of six percent per annum on that sum from March 14, 1946. (R. 7-8) Petitioner filed a petition in the Tax Court of the United States for a redetermination of the amount of excessive profits determined by the War Contracts Price Adjustment Board, which petition was dismissed on June 13, 1950, on motion of the parties. (R. 3). On July 30, 1947,

[1] See Appendix pp. 1a-2a.

the United States filed an action in the District Court, Eastern District of Michigan, under the applicable provisions of the Renegotiation Act[2] for the collection of the unilateral order of the War Contracts Price Adjustment Board, which action was dismissed after stipulation of the parties by order of the Court entered on June 2, 1950. (R. 3, 9, 10). Said dismissal was without prejudice under Rule 41 of the Federal Rules of Civil Procedure.[3] From time to time after the issuance of the order of the War Contracts Price Adjustment Board the Government withheld amounts otherwise due petitioner for supplies furnished the Government and, without petitioner's consent, applied such amounts to interest computed at six percent on the renegotiation indebtedness determined to be owing by the War Contracts Price Adjustment Board. (R. 3-4, 11-15). Petitioner subsequently paid the entire amount of the balance determined to be owing by the War Contracts Price Adjustment Board, including interest assessed at the rate of six percent per annum, and thus stopped the further accrual of interest on such determined amounts. Upon payment of such balance, petitioner stated that payment was not being made in recognition of the correctness of the determination. (R. 16). On final payment of such balance, petitioner, after filing a claim for refund of the difference between the amount of interest exacted at the regulatory rate and the amount recognized to be owing at a fair and equitable rate of interest, filed suit in the Court of Claims for recovery of such amount. (R. 5).

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[2] Section 403(c)(2) of the Renegotiation Act of 1943. See Appendix p. 1a.

[3] See Appendix p. 2a.

In its opinion, the Court of Claims recognized that in its prior decisions in *Eversharp* v. *United States*, (1954) 129 C. Cls. 722, 125 F. Supp. 244 and (1956) — C. Cls. —, 147 F. Supp. 502, the regulation of the War Contracts Price Adjustment Board requiring interest at six percent per annum be paid on renegotiation indebtedness was held invalid,[4] that interest at four percent per annum was reasonable, and that petitioner in that case was entitled to recover the amounts paid in excess of four percent interest per annum. The elements of duress were essentially the same in both *Eversharp* and in the instant case: collection by the Government of an order of an executive department at the six percent interest on the assumed authority of a regulation, and the constant accrual of interest, payment of which the Government required before any withholdings or amounts otherwise paid were to be applied to principal. The Court below, nevertheless, distinguished the *Eversharp* decision on the rationale that the overpayment of interest cannot be recovered "except by inducing the creditor [Government] to agree that a suit to recover the payment might be brought", (R. 26) and granted the Government's motion to dismiss the petition.

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[4] The majority of the Court of Appeals have, as the Court of Claims, declared the regulation of the War Contracts Price Adjustment Board requiring interest be paid at 6 per cent per annum to be invalid. cf. *United States* v. *Abrams*, (CA-6, 1952) 197 F. 2d 803, cert. den., 344 U. S. 855, 97 L. ed. 664; *United States* v. *Bonnell*, (CA-9, 1950) 180 F. 2d 145; *United States* v. *Wissahickon Tool Works, Inc.*, (CA-2, 1952) 200 F. 2d 936; *United States* v. *Edward Valves, Inc.* (CA-7, 1953) 207 F. 2d 329; *Ring Construction Corp.* v. *United States*, (CA-8, 1954) 209 F. 2d 668; *United States* v. *Best et al*, (CA-1, 1954) 212 F. 2d 743. *Contra: United States* v. *Philmac Mfg. Co.*, (CA-3, 1951) 192 F. 2d 517.

REASONS FOR GRANTING THE WRIT

The decision of the Court below should be reviewed because it is not in accord with the decisions of this Court. The decision below also introduces a new concept in Federal law which calls for consideration by this Court.

I. In *Swift & C. & B. Co.* v. *United States,* (1884) 111 U. S. 22, 28 L. ed. 341, 4 S. Ct. 244, this Court held that where the Commissioner of Internal Revenue made known a rule with respect to commissions on sale of stamps (which the Court later determined to be invalid) and transactions were made on the basis of the rule because they could be made on no other, the equivalence of coercion was implied and a claim against the Government arising therefrom was recoverable in the Court of Claims. In *United States* v. *Edmondston,* (1901) 181 U. S. 500, 45 L. ed. 971, 21 S. Ct. 718, where a purchaser of public land from the Government paid an amount per acre in excess of the amount for which, under the Acts of Congress, the land could be purchased, this Court observed that there was *no ruling* of the Land Department that the land was subject to greater charge paid, thus distinguished *Swift & C. & B. Co.* v. *United States,* and denied the claim for recovery of the excess paid. In *United States* v. *Emery, Bird, Thayer Realty Co.,* (1915) 237 U. S. 28, 59 L. ed. 825, 35 S. Ct. 499, this Court held that the lower Court, sitting as a court of claims, had jurisdiction over a claim for recovery of money paid, and without discussion on the point, affirmed the decision of the lower Court that where payment was made of an assessment, the alternative of which was the risk of an asserted five percent penalty and

interest accumulation of one percent per month, the payment was made under duress.

The decision of the lower Court herein is not in accord with the decisions of this Court in the above cases on the question of "legal duress."

II. Aside from the conflict with the decisions of this Court, and despite the recognition by the Court below that it had jurisdiction over the claim presented, as in *Eversharp,* supra, the Court below imposed a novel condition to a suit for recovery of money alleged to have been wrongfully assessed by the Government: that the plaintiff in the Court of Claims must induce the Government that suit might be brought. Such condition is not only novel in law but gives the executive department arbitrary power over suits in the Court of Claims. The decision of the Court below of itself raises an important question of Federal law which requires consideration by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES D. HAMEL
Attorney for Petitioner
1000 Shoreham Building
Washington 5, D. C.

Of Counsel:

LEE I. PARK
K. MARTIN WORTHY
FULLER HOLLOWAY

HAMEL, PARK & SAUNDERS
1000 Shoreham Building
Washington 5, D. C.

APPENDIX

STATUTES

Renegotiation Act of 1943, 58 Stat. 78, 83, c. 63 (50 App. U.S.C.A. Section 1191):

"Sec. 403 (c) (2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries of any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractors; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. * * *"

Title 28 U.S.C. § 1491. "Claims against United States generally

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

(1) Founded upon the Constitution; or

(2) Founded upon any Act of Congress; or

(3) Founded upon any regulation of an executive department; or

(4) Founded upon any express or implied contract with the United States; or

(5) For liquidated or unliquidated damages in cases not sounding in tort."

REGULATION

Renegotiation Regulations, 32 C.F.R. 1944, Ch. 14

"§ 1606.626-2 No delay in elimination of excessive profits determined by order.

* * * *

(c) Interest at the rate of 6% per annum accrues upon the amount determined as excessive profits to be eliminated less the tax credit, if any, from and after the date fixed in the demand for payment."

MISCELLANEOUS

Federal Rules of Civil Procedure

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23 (e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Opinion of the Court

IN THE UNITED STATES COURT OF CLAIMS

No. 186-56

(Decided January 16, 1957)

PUTNAM TOOL COMPANY, a Michigan corporation, in its own right and a successor in interest to E. C. Putnam and F. J. Nefske, d/b/a Putnam Tool Company, a co-partnership, and E. C. PUTNAM and F. J. NEFSKE, d/b/a Putnam Tool Company, a co-partnership, for the use and benefit of Putnam Tool Company, a Michigan Corporation,

v.

THE UNITED STATES

Mr. Fuller Holloway, for the plaintiff. *Messrs. Lee I. Park, Charles D. Hamel, K. Martin Worthy, Fuller Holloway, and Hamel, Park & Saunders* were on the brief.

Mr. James H. Prentice, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff is a corporation which has succeeded to the rights and obligations of a former partnership. In this opinion the word *plaintiff* will be used to designate the partnership, and, in its turn, the corporation.

The plaintiff sues to recover a sum which represents the difference between the 4 percent interest which it says it should have been charged, and the 6 percent interest which it was in fact charged, on its indebtedness to the Government resulting from a renegotiation of war contracts performed by it for the Government.

By a notice dated February 27, 1946, the War Contracts Price Adjustment Board notified the plaintiff that it had adopted the determination made by its subordinate board that the plaintiff had realized excessive profits in the year 1943 in the amount of $610,000, and that, recomputing the plaintiff's taxes to take account of the reduction of its income by that amount, it owed the Government $468,175. The notice demanded the payment of the latter sum, and said that interest at 6 percent would accrue on that sum after March 14, 1946.

On May 23, 1946, the plaintiff filed a petition in the Tax Court of the United States, the proper tribunal for such a proceeding, seeking a redetermination and reduction of the amount of its asserted excessive profits. On July 30, 1947, the Government brought a suit against the plaintiff in the United States District Court for the Eastern District of Michigan, to recover the amount of the plaintiff's renegotiation indebtedness. While that suit was pending, the Government set off in 1947 and 1948, three small sums otherwise due the plaintiff against the renegotiation indebtedness; on May 15, 1950, the plaintiff paid the Government $150,000 to apply on the indebtedness; and on June 2, 1950, the plaintiff paid the Government $434,176.10 as full payment of the remaining principal of the indebtedness, and accrued interest at 6 percent. On that same day, June 2, the Government's suit in the District Court was dismissed by stipulation of the parties.

When the plaintiff paid the Government the $434,176.10 on June 2, 1950, it wrote a letter saying:

> There is tendered herewith a certified check in the amount of $434,176.10 in full payment for all liability of the Putnam Tool Company for renegotiation liability, together with interest thereon as of this date. This payment is not made in recognition of the correctness of the determination nor in derogation of our right to continue to contest the validity of the determination if we so desire in the Tax Court of the United States.

The Tax Court proceeding was dismissed on June 13, 1950, on motion of the parties.

The plaintiff says that it paid interest at the rate of 6 percent because of the compulsion of an order of the War Contracts Price Adjustment Board, under the authority of an invalid renegotiation regulation fixing the rate of interest on unpaid renegotiation debts at 6 percent. It says that a fair and equitable rate of interest would be not more than 4 percent, and it sues for the difference, which amounts to $39,497.11.

In our decisions in *Eversharp, Inc.* v. *United States*, 129 C. Cls. 772 and — C. Cls. —, July 12, 1956, we held that the renegotiation regulation fixing the 6 percent rate of interest was invalid. Congress did not prescribe a rate of interest, nor authorize the War Contracts Price Adjustment Board to do so. But the Government is entitled to interest on debts owing to it. In the absence of a legislative, or a valid executive prescription of a rate of interest, the rate must be determined by the court, if the question of the rate is disputed and litigated. If a court fixes the rate, it does so on the basis of what is reasonable in the circumstances. In litigation over renegotiation debts, different District Courts, regarding the 6 percent regulation of the War Contracts Price Adjustment Board as invalid, have determined various rates of interest varying from 6 percent down, to be reasonable. In the second *Eversharp* case we determined 4 percent to be reasonable.

In the absence of a determination of a reasonable rate of interest by a court, we know of no other way in which the rate can be determined and the debt liquidated than by the action of the parties. In this case, for example, the Government demanded 6 percent, and the plaintiff paid it. It was not unlawful for the Government to demand 6 percent, since the question of what rate would be reasonable was an arguable question. The reason, no doubt, for the Government's agency's demanding 6 percent was that it thought that that rate was prescribed by a valid regulation.

And the reason that the plaintiff paid the 6 percent may well have been the same. Do these circumstances give the plaintiff the right to litigate the reasonableness of the rate in this suit in this court for the return of a part of the interest paid?

Other contractors whose profits had been renegotiated, and from whom interest at 6 percent had been demanded, refused to pay it, and, when sued by the Government, succeeded in persuading the court that a lesser rate of interest was reasonable. The plaintiff could have done the same. In fact, the Government did, as we have seen, sue the plaintiff in the District Court in 1947, and that suit was pending for some three years. In the meantime, the plaintiff had a proceeding pending in the Tax Court for a redetermination of the principal of the debt. Then, in June 1950, the plaintiff paid the entire balance of the principal and interest demanded by the Government, and both court proceedings were dismissed by stipulation of the parties.

We think that the plaintiff's payment to the Government was a voluntary payment, in the legal sense, and that it cannot recover a part of it in this suit. What apparently happened was that it had not occurred to the plaintiff that it might successfully dispute the interest charge, until after it had paid the Government's claim. Two years later the decision in *United States* v. *Abrams*, C. A. 6, 197 F. 2d, 803, *certiorari* denied 344 U. S. 855 came out, the first decision that the 6 percent renegotiation regulation was invalid. One cannot, in the absence of fraud or duress or mistake of fact or reservation agreement, or, perhaps, other special circumstances, pay a claim and later sue to recover the amount paid.

The plaintiff alleges, as we have said, that there was compulsion upon it which caused it to pay the claim. The debt was large, and the interest, at whatever rate, was accruing in a large amount. That is, however, true of any interest-bearing debt or asserted debt, and there would seem to be no way to stop the interest by payment, and at the same

time preserve the right to recover all or part of the payment, except by inducing the creditor to agree that a suit to recover the payment might be brought. That is what was done in the *Eversharp* case, *supra*. The fact that interest will or may accrue upon a claim, if it is not paid, is not legal duress which will make its payment recoverable.

The plaintiff points to the letter that it wrote when it made its payment in full. We have quoted the letter above. It said:

> This payment is not made in recognition of the correctness of the determination nor in derogation of our right to contest the validity of the determination if we so desire in the Tax Court of the United States.

The plaintiff says that this letter preserved its right to prosecute the instant suit. We think the letter had no relation to interest, the subject matter of the instant suit. The Tax Court's function was to examine the correctness of the administrative determination of the amount of the excess profits. It had nothing to do with determining the correct rate of interest if the renegotiation debt was not paid. We need not decide whether or not an attempted unilateral reservation of a right to sue to recover a payment made would be effective, since the plaintiff's letter did not purport to be a reservation of any right except to pursue its pending proceeding in the Tax Court. Even this right was voluntarily abandoned a few days later by the dismissal of the proceeding upon the motion of both parties.

The defendant's motion to dismiss the plaintiff's petition is granted.

It is so ordered.

LARAMORE, *Judge*; WHITAKER, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.